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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case 07-513 , Herring v. United States. Miss Karlan.

ORAL ARGUMENT OF PAMELA S. KARLAN

ON BEHALF OF THE PETITIONER

MS. KARLAN: Thank you, Mr. Chief Justice and may it please the Court:

In February 2004, the Dale County circuit clerk told the local sheriff's department that the court was recalling a warrant that had been issued earlier for Petitioner's arrest. Having received that notice, someone in the sheriff's department physically removed the warrant from the file and physically took the warrant back to the court clerk's office. But no one either then or later in the sheriff's department ever updated the computer file to indicate that the record had -- that the warrant had been recalled. As a result of that police department error, the Petitioner in this case was subject to a warrantless arrest for which there was no probable cause five months later.

CHIEF JUSTICE ROBERTS: Didn't they have some regular system for updating the computer base? I mean, I assume it was updated at some point.

1 MS. KARLAN: No. Your Honor. There was
2 no -- there's nothing in the record to suggest that this
3 department ever does, for example, what the FBI does,
4 which is to conduct periodic audits. Had they conducted
5 one, they would have discovered almost instantly what
6 they discovered five months later, which was there was
7 no warrant in this case. So this --

8 CHIEF JUSTICE ROBERTS: So people who are,
9 you know, the warrant is served, they're arrested, they
10 go to trial, they're in jail, their name still shows up
11 as having a warrant out for their arrest.

12 MS. KARLAN: We don't know, Mr. Chief
13 Justice, because this is a department that as far as the
14 record reflects conducts no audits of any kind to update
15 its files. And if you look at page 41 and page 60 of
16 the joint appendix, one of the things you'll discover
17 about this department is that everyone in the department
18 has access to the physical place warrants are kept.
19 They're kept in several different places in the office.

20 CHIEF JUSTICE ROBERTS: Well then, how did
21 this warrant clerk, I guess is what I'd call her,
22 discover the error? She discovered it within 10 or 15
23 minutes, right.

24 MS. KARLAN: She discovered it because what
25 happened is a clerk in another police department called

1 and said, is there a warrant for Petitioner's arrest.
2 She looked at the computer list on her computer and said
3 yes. Then this other warrant clerk said, please fax us
4 a physical copy of the warrant. So she went to the file
5 where the warrant should have been. It wasn't there.
6 She went to another file. The warrant wasn't there.
7 She then called the court clerk's office and discovered
8 that they had recalled the warrant which was back in
9 their records five months earlier.

10 CHIEF JUSTICE ROBERTS: Why did the first --
11 first person in that scenario need a physical copy of
12 the warrant?

13 MS. KARLAN: The record doesn't reflect
14 that, but she simply I guess wanted to verify that there
15 actually was a warrant because they were picking
16 Petitioner up in a different county.

17 JUSTICE ALITO: Does your argument depend on
18 the quality of the recordkeeping in this particular
19 department? I thought your argument would apply even if
20 this department had excellent recordkeeping procedures
21 but nevertheless made a mistake in this instance.

22 MS. KARLAN: That's correct, Justice Alito.
23 Our view is, just as is true with respect to probable
24 cause, the fact that 99 percent of a department's
25 arrests are with probable cause doesn't mean that when

1 they arrest someone without probable cause you say,
2 well, you get one bite at the apple or a sort of "good
3 enough for government work" theory.

4 JUSTICE ALITO: You're not asking for
5 Arizona v. Evans to be overruled are you.

6 MS. KARLAN: No. We're asking to you apply
7 Arizona v. Evans. And if I could give an answer to the
8 question the Chief Justice was asking earlier that comes
9 from Arizona v. Evans, what happened in Arizona v. Evans
10 -- and Justice Stevens mentions this in his dissent
11 there -- is the clerk discovered there, the court clerk
12 discovered, that the warrant that had been, that she had
13 verified, had in fact been recalled. And so what they
14 instantly did is they checked their files, and they
15 discovered four other warrants from that same day that
16 had been recalled but that were still in their files.

17 Here we didn't have anything done after they
18 discovered the error. They discovered this error and,
19 as they say, have gone on their merry way. There's
20 nothing in this record --

21 CHIEF JUSTICE ROBERTS: Well, there was
22 something done in this particular case, though, right?
23 The warrant clerk notified -- was it the Coffee County
24 people?

25 MS. KARLAN: Yes, Mr. Chief Justice.

1 CHIEF JUSTICE ROBERTS: -- that the warrant
2 -- that the information she had given 10 minutes before
3 was inaccurate.

4 MS. KARLAN: Yes, Mr. Chief Justice. And
5 that indicates part of what we're concerned about here,
6 which is this is a department that was built for speed,
7 not for accuracy.

8 JUSTICE ALITO: But none of that matters for
9 your argument, does it?

10 MS. KARLAN: Oh, no.

11 JUSTICE ALITO: You want to make it -- you
12 want to draw a clear line between errors by -- by
13 clerical court employees versus errors by police
14 employees.

15 MS. KARLAN: That's correct. We think
16 that's the most workable argument, because what we want
17 is a system in which suppression hearings can be
18 conducted expeditiously based on the facts of particular
19 cases.

20 JUSTICE ALITO: How expeditious would it be
21 -- suppose there's negligence on the part of both a
22 court employee and a police department employee. What
23 is the judge supposed to do in deciding the suppression
24 motion? Is this a comparative negligence determination.

25 MS. KARLAN: I don't think it would be

1 exactly a comparative negligence determination. I think
2 it -- that raises a difficult question and the way I
3 would approach that question is to perhaps use some of
4 what Justice Kennedy talked about in Hudson as a
5 causation approach. That is, if but for the negligence
6 of the police department there would have been --

7 JUSTICE SCALIA: I thought negligence is
8 irrelevant here. I think if the police department was
9 wrong, even if they had been very careful but for some
10 reason or other they made a mistake -- so you're arguing
11 for sheer causality, not for negligence. If negligence
12 made the difference then we'd have to go into these
13 factors that you say are very difficult to calculate.

14 MS. KARLAN: Well, Justice Scalia, I was
15 answering Justice Alito's question and if I could just
16 give a little bit of --

17 JUSTICE SCALIA: I know you were answering
18 his question, but you want to answer it in a way that's
19 consistent with your argument here.

20 MS. KARLAN: Well, it is, Justice Scalia.
21 So let me explain why it's consistent, which is our
22 position is if police department error causes an
23 unconstitutional arrest then you should suppress
24 evidence, but if both the police were negligent and the
25 clerk was negligence and the police department's

1 negligence.

2 JUSTICE SCALIA: You've injected the word
3 "negligence."

4 MS. KARLAN: Okay, let me take the word
5 "negligence" out then. If the police error didn't cause
6 the discovery of the evidence --

7 JUSTICE SCALIA: Alone, but --

8 MS. KARLAN: -- that's correct.

9 JUSTICE SCALIA: -- there is dual
10 causality.

11 MS. KARLAN: Yes.

12 JUSTICE SCALIA: It isn't a matter of simple
13 negligence.

14 MS. KARLAN: No, that's correct. That's
15 correct.

16 CHIEF JUSTICE ROBERTS: How is it going to
17 keep --

18 JUSTICE ALITO: How are -- how are you going
19 to determine whether there's error without determining
20 whether there's negligence? Suppose the court clerk
21 calls up the police department and says the warrant is
22 still outstanding, and in fact it's not. And it sends
23 them over a physical copy of a warrant, but that warrant
24 has been withdrawn. Now, the police could always take
25 additional steps: They could send someone over to check

1 the records, to look at the court docket to make sure
2 that the warrant had not been withdrawn. So there would
3 be causality, but it would not determine what they
4 should --

5 MS. KARLAN: There would be no police error
6 there.

7 JUSTICE ALITO: -- what their duty was.
8 How are you going to determine where this error should
9 be -- should be assigned?

10 MS. KARLAN: Because in that case there
11 would be no police error. What this Court held in Evans
12 is that police departments are entitled to rely on the
13 representations of court clerks that there are warrants.
14 So if the court clerk erroneously sends a warrant over,
15 the police are not required to look behind that warrant,
16 just as they're not required in Evans.

17 JUSTICE ALITO: Let me give you another
18 example. Suppose that the court clerk calls up and says
19 -- it leaves a message, gives a message to somebody in
20 the police department. And they memorialize that, and
21 they say "called up." And let's say the warrant number
22 is the same as the docket number of this case. So the
23 court employee says -- writes down "Called up," says,
24 "Warrant quashed in warrant, in case 07-513." The court
25 -- the police department has a record of the call, and

1 they say, "Received call from court clerk. Warrant to
2 be quashed. Warrant quashed in case 07-531." And so
3 the 513 is not quashed; the person is arrested. Now,
4 who caused that? You have to have a hearing?

5 MS. KARLAN: The police -- the police
6 department person caused that by writing down the wrong
7 number.

8 JUSTICE ALITO: How do you know that the
9 police department wrote down the wrong number?

10 MS. KARLAN: Well, it's the same question as
11 --

12 JUSTICE ALITO: How do you know what number
13 was --

14 MS. KARLAN: Well, it's the same question as
15 in Evans: How do we know who made the mistake? That
16 question, just like the question -- is a question on
17 which you're going to have to hold a hearing because
18 Evans says if it was court error, there is no
19 suppression; and our position is, if it was police
20 error, there is. But that's a very manageable hearing.

21 JUSTICE SCALIA: Just so I have your theory
22 firmly in mind, you would say there is police error even
23 if what happened was that there was an unpredictable and
24 unavoidable computer glitch, no negligence on anybody's
25 part? The computer simply malfunctioned, got it wrong.

1 It wasn't negligence. You would still say that that is
2 police error, and you would say that that counts against
3 the admission of --

4 MS. KARLAN: That's correct. As long as
5 it's police error, it counts against the police.

6 JUSTICE BREYER: Why, if there is no
7 negligence? Why do you need to argue that and why do
8 you argue that? I mean doesn't there have to be at
9 least negligence on somebody's part?

10 MS. KARLAN: Well, here's the problem:
11 There are two kinds of negligence you might have; that
12 is, you might have the negligence of an individual
13 employee, or what you might have is a decision to use a
14 shoddy recordkeeping system that doesn't catch those
15 errors. So the question is --

16 JUSTICE BREYER: Well, either of those
17 things are negligence or worse.

18 MS. KARLAN: Yes.

19 JUSTICE BREYER: So what I didn't understand
20 is why you would charge the police with anything or
21 suppress a warrant where there was a mistake but no one
22 was negligent or worse.

23 MS. KARLAN: Well, we have had some
24 difficulty finding any reported cases in which there is
25 a police error of the kind of computer glitch that was

1 just hypothesized. That is where the machines --

2 JUSTICE BREYER: But what you argued for --

3 MS. KARLAN: Yes. What --

4 JUSTICE BREYER: -- you said, it should be
5 suppressed even if no one is negligent or worse. And I
6 have trouble seeing why you're suppressing a warrant
7 where no one does anything wrong at all.

8 MS. KARLAN: Well, part of what I'm trying
9 to get at in my answer to your question is it's unclear
10 in that situation whether anyone has done something
11 wrong; that is, whether somebody in the police
12 department programmed the police department computer --

13 JUSTICE KENNEDY: Let's just assume the
14 hypothetical -- the hypothetical: The computer
15 malfunctions.

16 MS. KARLAN: Well, you could have an act of
17 God exception to exclusionary rule, if you wanted to,
18 but this case doesn't ask you to do that.

19 JUSTICE KENNEDY: I'm sure a computer might
20 be compared to God, but let's --

21 (Laughter.)

22 JUSTICE STEVENS: Could I ask this question
23 --

24 MS. KARLAN: It's more powerful sometimes.

25 JUSTICE STEVENS: Could I ask this question?

1 You're saying that the question is whether anybody did
2 anything wrong at all. This is not undisputed, that
3 this person was illegally arrested? The arrest itself
4 violated the Fourth Amendment.

5 MS. KARLAN: There is no question that as a
6 matter of fact --

7 JUSTICE STEVENS: The question is whether it
8 can be justified.

9 MS. KARLAN: Yes. This was a warrantless
10 arrest without probable cause. And the question is:
11 Does the government have some sort of affirmative
12 defense as to why it should be allowed to use this?
13 Now, in Evans --

14 CHIEF JUSTICE ROBERTS: It's a separate
15 question. It may be an illegal arrest, but the question
16 is the separate one of whether or not you exclude the
17 evidence collected incident to that arrest. And we
18 have, in several cases, separated the two questions, and
19 I guess it's difficult for me to see if no one has done
20 anything wrong, no one, why you would suppress the
21 evidence in that case.

22 MS. KARLAN: Well, that case of course is
23 not this case, and you might want to leave open the
24 question of the --

25 CHIEF JUSTICE ROBERTS: No, but you have

1 this difficulty: Do we have to get into negligence, or
2 should we assume, as I understand to be your theory, as
3 Justice Breyer put it, that you would still suppress the
4 evidence when no one has done anything wrong?

5 MS. KARLAN: We are asking in this case for
6 you to suppress when someone has done something wrong.

7 JUSTICE GINSBURG: But how do you know? How
8 do you know? That's the problem.

9 MS. KARLAN: Well, we do know that someone
10 did something wrong here, because we know --

11 JUSTICE KENNEDY: But we want an answer --

12 MS. KARLAN: No, I'm trying to answer --

13 JUSTICE KENNEDY: We want an answer to the
14 question.

15 MS. KARLAN: No, I'm trying --

16 JUSTICE KENNEDY: Let's assume no one did
17 anything wrong.

18 MS. KARLAN: I know. I'm trying to answer
19 that question.

20 JUSTICE KENNEDY: -- because this bears on
21 the fact of why are we doing this at all.

22 MS. KARLAN: No. I'm trying to answer that
23 question, and the point I wanted to make is: This case
24 asks for a narrow rule, but the question that you may
25 also want to be thinking about here is how to have a

1 workable suppression hearing. And if you require
2 showings of different levels of fault, rather than
3 asking was this police-generated error, the suppression
4 hearings are going to be somewhat more cumbersome. So
5 you have a choice.

6 JUSTICE SCALIA: Exactly. You give
7 something, you get something. If you adopt a negligence
8 theory, the --

9 MS. KARLAN: We would be happen with the
10 negligence theory.

11 JUSTICE SCALIA: -- the noose is not as
12 wide, but on the other hand it's a lot harder to
13 calculate whether you -- every case involves an inquiry
14 into whether there's police negligence or not.

15 MS. KARLAN: That's exactly what I'm --

16 JUSTICE SCALIA: A much easier rule, was
17 there a warrant or not? If there wasn't, end of the --
18 end of the inquiry.

19 MS. KARLAN: Well, that's exactly why I --
20 why I said I think the easier rule for judges faced with
21 suppression hearings is a rule that says --

22 JUSTICE BREYER: I mean, I don't know what
23 the underlying law is here. I mean -- I guess it's
24 little weird, but what happens if the policeman arrests
25 the wrong person, but it's nobody's fault? You know,

1 the person was pretending to be his brother.

2 MS. KARLAN: Well, that's like --

3 JUSTICE BREYER: Or the mother said it's
4 John and it's really Joe. And so, the policeman wasn't
5 at fault. They arrest the wrong person. I guess that's
6 happened in history --

7 MS. KARLAN: Sure.

8 JUSTICE BREYER: -- but do they suppress
9 things then? I wouldn't think so --

10 MS. KARLAN: Well, there are two different
11 --

12 JUSTICE BREYER: -- but maybe they do.

13 MS. KARLAN: There are two different kinds
14 of cases where police arrest people: One set of cases
15 where the policeman is arresting on the basis of
16 probable cause, and there, there's a lot of room for
17 error that is based on the facts. The mother told him
18 it was Joe when it was really John. That's good enough,
19 good enough, because that's probable cause.

20 JUSTICE BREYER: But do we suppress?

21 MS. KARLAN: No, you do not --

22 JUSTICE BREYER: We do not? Okay.

23 MS. KARLAN: There was not even a Fourth --

24 JUSTICE BREYER: So there's no reason then,
25 if we don't suppress when there's no error in the part

1 of the policeman, none, it was just a weird
2 circumstance, then I don't understand why we would
3 suppress here. And nor do I understand why you have to
4 argue this because I thought it's clear here that there
5 is error, and it was negligently caused. There were
6 four months that went by without anybody doing anything
7 about this mistake.

8 MS. KARLAN: No. That's correct. If I can
9 just say one thing that will make this perhaps a little
10 clearer, Justice Breyer, you would not even find a
11 Fourth Amendment violation in the first place in the
12 hypothetical you gave because there was probable cause
13 to arrest.

14 JUSTICE SCALIA: Isn't there probable cause
15 here?

16 MS. KARLAN: Probable cause to do what?

17 JUSTICE SCALIA: He thought he had a
18 warrant; he had probable cause to arrest.

19 MS. KARLAN: There is no such thing as
20 probable cause to believe there's a warrant. You
21 yourself in Hudson said it's a bright-line rule. Either
22 there's a warrant or there isn't. Here there was no
23 warrant.

24 CHIEF JUSTICE ROBERTS: Well, that's just
25 rephrasing it. It's probable cause based on the

1 existence of a warrant, and it turns out to be there is
2 a mistake in the warrant.

3 MS. KARLAN: This Court has never said that
4 before, which is it's not probable cause to believe
5 there's a crime because there's a warrant. It's --
6 you've always separated those two lines of cases for --

7 JUSTICE SCALIA: It doesn't seem to make
8 sense, though. Why should we separate the two?

9 MS. KARLAN: Well, because here --

10 JUSTICE SCALIA: If the policeman is
11 mistaken about whether he saw this guy picking
12 somebody's pocket, he's mistaken about that, and in that
13 case, the search is -- the product of the search is
14 admitted. In the other case he's mistaken about whether
15 there was a warrant. Why do you want to draw a line
16 between those two?

17 MS. KARLAN: Well, for two reasons: One is,
18 even in the probable cause case, if the reason he
19 thought there was probable cause is another officer told
20 him there was probable cause and that officer was wrong,
21 this Court said in Leon you continue to suppress. Here,
22 this police officer was told by other police personnel
23 that there was a warrant, and there wasn't. So it's a
24 case just like the cases post-Leon -- you suppress when
25 the chain of information is fatally flawed by police

1 error, which is what happened here.

2 CHIEF JUSTICE ROBERTS: So, you would impose
3 a burden on the officer on the street serving a warrant?
4 When he gets the call saying there's a warrant, he's
5 supposed to say, "Are you sure? Did you double-check
6 with the clerk? When was the last time they updated the
7 computer system? I don't want to go through all this if
8 the evidence is going to be suppressed." At every chain
9 in command, you would impose that burden.

10 MS. KARLAN: No, I would not, Mr. Chief
11 Justice, because if you announce that police error is
12 going to lead to the suppression of evidence, the police
13 will do a better job of maintaining their records.

14 CHIEF JUSTICE ROBERTS: Yes, but I mean I
15 don't know what the situation is like --

16 MS. KARLAN: And then you won't have this
17 problem.

18 CHIEF JUSTICE ROBERTS: I don't know what
19 the situation is like in Dale County. They probably
20 don't have the latest version of WordPerfect, or
21 whatever it is. They are probably making do with
22 whatever they can under their budget and doing the best
23 they can.

24 MS. KARLAN: But there's not a Barney Fife
25 defense to the violation of the Fourth Amendment either.

1 If a department is having its records kept the way they
2 are keeping them here, then suppression is the only
3 thing that tells them: You're going to have to --

4 CHIEF JUSTICE ROBERTS: Well, you said this
5 wasn't anything in the record about what type of program
6 they might have, whether they were updated. They found
7 the mistake in ten minutes.

8 MS. KARLAN: Which suggests if they had been
9 doing a good job of maintaining their records all along,
10 this violation never would have occurred.

11 JUSTICE ALITO: Well, what's the
12 justification for drawing a distinction between a court
13 employee and everybody who works for the police
14 department? Suppose the person who makes the mistake in
15 the police department is a -- a person who holds a
16 unionized position where advancement is based purely on
17 seniority, or it's a civil service position where the
18 person is -- is totally protected from any sort of
19 adverse job consequences as a result of displeasure
20 about or pleasure about how the job is being -- being
21 performed.

22 And what's the justification for drawing a
23 distinction between errors committed by those two
24 employees just based on where they fit in the
25 organizational box?

1 MS. KARLAN: Well, three things: One is the
2 police themselves are often unionized and protected from
3 retaliation.

4 Second --

5 JUSTICE ALITO: What if it's not a police
6 officer; it is not a law enforcement officer? It is a
7 clerical employee, or it's a computer guy.

8 MS. KARLAN: Well, I think that the clearest
9 line is inside the police and outside, and let me give
10 you a couple of reasons why. The first reason --

11 JUSTICE GINSBURG: Well, one is that you --
12 you are stuck with the Arizona v. Evans, which says if
13 it's the court --

14 MS. KARLAN: Well, if it's the court, yes;
15 but I -- I was going to give some reasons why the police
16 department should be treated as an integrated whole.

17 One reason why is in many departments
18 officers, sworn officers, who are on desk duty for
19 physical disabilities and the like, perform clerical
20 tasks.

21 The second is on the record in this case.
22 We don't know whether it was a sworn officer who removed
23 the warrant from the file or it was a clerk, and there's
24 no way of finding that out now.

25 A third reason, if I could just point to

1 this --

2 CHIEF JUSTICE ROBERTS: Sure.

3 MS. KARLAN: -- this Court, for just a
4 moment, is clerical personnel, support personnel --
5 there is a reason they are called "support personnel".
6 They support the mission of the office, and here this
7 office decided to maintain its records in a particular
8 way and to have this quick reference file and the like,
9 presumably to support --

10 CHIEF JUSTICE ROBERTS: But the Coffee
11 County people aren't called "support officers" for the
12 Dale County police.

13 MS. KARLAN: They are support for the
14 police, and this Court has --

15 CHIEF JUSTICE ROBERTS: Now you keep saying
16 this when you did this in your brief. You just call
17 everybody "police," "police," "police," when the
18 question is whether there's a distinction between the
19 Coffee County police and the Dale County police for
20 purposes of applying the exclusionary rule.

21 MS. KARLAN: This Court, at least since
22 Elkins, has recognized that police departments often
23 operate across the board. If I could point to Leon
24 itself, in Leon the search was conducted by California
25 municipal police, and the evidence was used in Federal

1 court.

2 And this Court never suggested, not even for
3 a minute, that the fact that the evidence was obtained
4 by State-level -- local-level police and used in a
5 Federal prosecution was relevant to the question whether
6 or not it should be suppressed. Because what the Court
7 is trying to do in the exclusionary rule, as I
8 understand it, is to deter future violations.

9 JUSTICE SCALIA: That's crucial to your case
10 --

11 MS. KARLAN: Yes.

12 JUSTICE SCALIA: -- really, that you -- that
13 the police will not keep good records unless -- unless
14 we let the criminals go.

15 MS. KARLAN: That they need a powerful
16 incentive.

17 JUSTICE SCALIA: And that's the theory of
18 the exclusionary rule as --

19 MS. KARLAN: Yes.

20 JUSTICE SCALIA: -- as has been expressed in
21 writings in some of our prior cases. Things have
22 changed a whole lot since we adopted the exclusionary
23 rule, and I think it's quite -- policing has become much
24 more professional, and I think it's quite unrealistic to
25 think that if we don't adopt the rule that you -- that

1 you propose, police -- police departments will just
2 willy-nilly not keep track of warrants. I -- I just
3 don't think that's true. That's not professional
4 policing, and -- and I think to say -- to apply the --
5 the severe remedy that you propose in this -- in this
6 area at this date seems to me excessive.

7 MS. KARLAN: Well, we don't think this is a
8 severe remedy, and we think that the professionalism of
9 the police is in substantial part a response to the
10 message that the exclusionary rule sends, which is
11 either you professionalize your police departments or
12 the evidence they obtain is going to be suppressed;
13 either you maintain good records or the reliance on
14 those records is going to lead to suppression.

15 JUSTICE SCALIA: You don't think that --

16 JUSTICE GINSBURG: We don't know if these
17 records are good, bad, or indifferent. As far as this
18 record shows, this could be an isolated incident, or it
19 could be typical of what goes on. We just don't know.

20 MS. KARLAN: It could be, and if I can just
21 point to -- if you look at the Government's brief at
22 page 48, they talk about how the FBI maintains its
23 "Wanted" lists now. And they show that due to a list of
24 reforms they were able to cut the error rate there from
25 about 6 percent to about 3 percent. None of those

1 reforms, limited access to entry, periodic audits, is
2 done here. And the last available published data, which
3 we cite in our brief about -- about Alabama, is that
4 they had about a 13 percent error rate. That is, 13
5 percent of the --

6 CHIEF JUSTICE ROBERTS: So you are back to
7 arguing that there was negligence, and that that's
8 pertinent.

9 MS. KARLAN: Well, in this case there was
10 negligence, and you need not go any further than that.
11 If the Court has no more questions, I'll reserve the
12 remainder of my time.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Miss Karlan.

15 Mr. Dreeben, we'll hear now from you.

16 ORAL ARGUMENT OF MICHAEL R. DREEBEN

17 ON BEHALF OF THE RESPONDENT

18 MR. DREEBEN: Thank you, Mr. Chief Justice,
19 and may it please the Court:

20 The exclusionary rule under this Court's
21 cases has always been a balance between the interest in
22 achieving some deterrence of police misconduct and the
23 high cost of excluding probative evidence of criminal
24 activity. The exclusionary rule does not put the error
25 back in the box. It does not correct it. It serves

1 only as incentives for future compliance to avoid future
2 Fourth Amendment errors.

3 In this case, where nothing is shown other
4 than a negligent and isolated clerical error in the
5 maintenance of warrants, there is no showing that
6 suppression of evidence will achieve the kind of
7 appreciable deterrence that this Court has said is
8 necessary before the exclusionary rule is applied.

9 CHIEF JUSTICE ROBERTS: Do we assume on the
10 basis of the record that there is negligence in this
11 case?

12 MR. DREEBEN: The district court did find
13 that there was negligence. There is very little in the
14 record, Mr. Chief Justice, that explains precisely what
15 did happen. But I would take issue with my colleague's
16 comment that the record shows that there were no
17 auditing procedures. The record simply was not made on
18 whether there were auditing procedures.

19 What the district court did find based on
20 testimony is that the Dale County Clerk's Office and the
21 Dale County Sheriff's Office both had a reliable system
22 of recordkeeping on which law enforcement could rely.
23 That's a finding of the district court.

24 CHIEF JUSTICE ROBERTS: Now, Ms. Karlan made
25 the point -- and I'd like to get your response to it --

1 that if we adopt something that depends on the showing
2 of negligence, that that will require extensive hearings
3 in every case into exactly what their computer update
4 system was, and so on.

5 MR. DREEBEN: Mr. Chief Justice, I actually
6 think that negligence alone should not be enough to
7 justify suppression, because it would not produce the
8 appreciable form of deterrence that this Court has said
9 is warranted. But I also think that --

10 JUSTICE SOUTER: May I interrupt you there?
11 I mean, why do you say that? I mean, we -- we have --
12 just getting outside the criminal law for a minute, we
13 -- we've got a whole system of personal liability law in
14 which the theory is that, in effect, requiring
15 compensation for negligence, even though it is not an
16 act of bad faith or malice, is -- is going to affect
17 conduct. Why do you assume it will not affect conduct
18 here?

19 MR. DREEBEN: I'm not sure that it won't
20 affect conduct to some degree, Justice Souter. I think
21 the exclusionary rule requires far more than saying that
22 it might affect conduct, and I think that what the Court
23 should look at --

24 JUSTICE SOUTER: Don't you think it's
25 probable that it will affect conduct? I mean, if the

1 police know that they are going to lose the case because
2 they are engaging in a negligent or objectively
3 unreasonable way in -- in relation to their
4 warrant-keeping, they are going to be more careful.

5 MR. DREEBEN: I think the incremental change
6 in police behavior will be modest at best, and I think
7 this is crucial to my view of the case.

8 JUSTICE SCALIA: They -- they won't know
9 that they are going to lose a case. What they will know
10 is that if they happen to arrest someone whom they
11 should not have arrested anyway, they won't be able to
12 prosecute him, right?

13 MR. DREEBEN: That's precisely so.

14 JUSTICE SCALIA: So they are saving
15 themselves nothing. I mean, this person would not have
16 been stopped. I mean, if the difference was we -- we
17 caught a criminal and we could have convicted him except
18 because of the clerical error we can't, but that's not
19 the situation. They would never have found this fellow
20 but for the clerical error.

21 MR. DREEBEN: Justice Scalia, if you take it
22 --

23 JUSTICE SOUTER: But they -- but they also
24 --

25 MR. DREEBEN: -- if you take it --

1 JUSTICE SOUTER: But they also, as in this
2 case, in the course of -- of committing their -- their
3 negligent arrest find evidence of a crime.

4 MR. DREEBEN: They do. But from an ex ante
5 perspective, Justice Souter, they can't know that, but
6 they do have --

7 JUSTICE SOUTER: They can't know that, but
8 we all know, as a practical matter, that that's why
9 police want the -- the greatest scope to the arrest
10 power.

11 MR. DREEBEN: No, I think that --

12 JUSTICE SOUTER: Because in the course of
13 doing incidental searches, they find things. They know
14 that, and we know that.

15 MR. DREEBEN: Justice Souter, what I think
16 it's important for the Court to know is that the
17 police have ample incentives as it stands to try to make
18 their recordkeeping systems as accurately as possible.
19 The police do not have an interest in believing that
20 there is an outstanding warrant for someone's arrest
21 when there is not.

22 The first reason is that an arrest situation
23 is a highly dangerous encounter for police officers.
24 It's not one to be undertaken lightly. That's why this
25 Court has rules that govern searches incident to arrest

1 in order to remove potential weapons from suspects. The
2 police don't want to convert what would be an otherwise
3 routine traffic stop or no stop at all into a felony
4 encounter that could go bad for all concerned.

5 Second, there is --

6 JUSTICE KENNEDY: Is there a 1983 violation
7 here?

8 MR. DREEBEN: On the facts of this case,
9 Justice Kennedy, I would not say there is 1983
10 liability. It's a litigable issue whether there would
11 be the potential for a plaintiff to show, as the
12 defendant in this case did not try to show, that there
13 was a degree of deliberate indifference to a need to
14 have a reliable recordkeeping system such that some
15 official would be personally liable for the failure to
16 have that.

17 JUSTICE KENNEDY: I suppose if the concern
18 were that the police would become sloppy, then a 1983
19 suit would be more likely?

20 MR. DREEBEN: Yes. I think a 1983 suit, and
21 there is ample evidence that many such suits have been
22 brought, and we cite cases in our brief and the
23 Petitioner cites cases in his brief.

24 JUSTICE STEVENS: Mr. Dreeben, can I go back
25 to your point you were just making. What incentive does

1 the police department have to withdraw warrants that
2 have been cancelled? Why not just leave them there? As
3 long as they are there, it would justify an arrest.

4 MR. DREEBEN: Well, that assumes, I think,
5 contrary to this Court's assumption of good faith on
6 governmental actors --

7 JUSTICE STEVENS: If you put aside good
8 faith for the moment. If you just think in terms of
9 incentives of officers, would they not have an incentive
10 just to leave everything there?

11 MR. DREEBEN: No. There are three reasons
12 why they would not. The first is the danger factor, as
13 I mentioned.

14 JUSTICE STEVENS: The existence or
15 nonexistence of the warrant doesn't affect the danger.

16 MR. DREEBEN: Oh, it certainly does, because
17 it converts what would otherwise be not a stop at all or
18 a reasonable suspicion stop into a felony arrest. And
19 when the police are undertaking an arrest, this Court
20 has recognized that suspects often have an incentive to
21 escape or to use weapons to resist --

22 JUSTICE STEVENS: But the incentive exists
23 whether there is a warrant in his pocket or not.

24 MR. DREEBEN: If there is no warrant, there
25 will be no arrest. And that's why the police have an

1 incentive to clean up the records so that they don't
2 send out the police on warrant situations when there is
3 no warrant.

4 JUSTICE GINSBURG: Mr. Dreeben, what you've
5 said about the danger to the arresting office -- officer
6 and so they don't undertake an arrest lightly, doesn't
7 fit with the facts of this case. This was a police
8 officer who really wanted to go after the defendant. He
9 expected -- he suspected defendant was a bad guy. So
10 that's how this all started. So he called his own
11 department, do we have any warrant, and then the next
12 county's department. But this was an officer who wanted
13 to go after the defendant.

14 MR. DREEBEN: Well, Justice Ginsburg, I
15 assume that the Court will make its decision not based
16 on the conduct of Officer Anderson in this case, but in
17 an assessment nationwide of whether the exclusionary
18 rule is necessary because the police lack incentives to
19 keep warrant systems up to date. And I'm giving reasons
20 why institutionally the police do have that incentive
21 and, therefore, undertake those kinds of efforts.

22 JUSTICE KENNEDY: And there are three
23 reasons. One is to reduce the incidence of arrests, so
24 they don't have the hazard of felony arrests.

25 Number two is?

1 MR. DREEBEN: The second reason is police
2 resources. It takes a lot of time and energy to
3 undertake a felony arrest. Many jurisdictions have
4 dedicated warrant forces which seek to serve outstanding
5 warrants, and they don't want to spend their time doing
6 it on warrants that have been recalled.

7 Similarly, in a case like this, the police
8 happened to find drugs on Petitioner's person and a gun
9 in his car, but if they had found nothing and taken him
10 down to the station house and booked him, that would
11 have been taking two police officers off the street for
12 an afternoon, wasting their resources so that they're
13 not engaged in the kind of protection of the community
14 that the police force wants to do.

15 And the third reason is that it does not
16 create community goodwill to undertake arrests when
17 people do not have warrants and simply because of a
18 mistake in police records they're hauled downtown.
19 That's the kind of thing that creates friction between
20 the police and communities.

21 JUSTICE BREYER: There is one question I
22 have in my mind, and it's the only factor I thought of
23 hypothetically that cuts against you. This is the
24 argument and I'd like you to respond to it.

25 I take everything you said as so. I'll

1 assume all that. And so I'd still say the rule, the
2 basic rule of suppression, putting Leon to the side,
3 basic rule is -- the opposite of Holmes: If the
4 constable blunders, you suppress the evidence. Okay.

5 Now, our prior case -- here we have a case
6 where the constable blundered. I grant you, not the
7 arresting officer. It was a different policeman, and it
8 was a different form of error. But five months this
9 thing -- this warrant had been recalled five months
10 earlier and you agree that it was negligent. Therefore,
11 the constable blundered. And the virtue of our earlier
12 case where we said don't suppress, it wasn't the
13 constable who blundered. So I see an absolutely clear
14 line: If the constable blunders you suppress; if it's
15 somebody else who blundered, you don't.

16 Now, every time I've tried to think of a
17 substitute for that clear line, I've run into trouble.
18 I've been sitting in my chambers with my law clerks and
19 we've tried out five substitutes, and I can't find one
20 decent substitute that isn't filled with problems.

21 MR. DREEBEN: Justice Breyer --

22 JUSTICE BREYER: What is your substitute?

23 MR. DREEBEN: Well, my first answer, Justice
24 Breyer, is that this Court's exclusionary rule
25 jurisprudence already draws a number of careful lines

1 based on the balance that --

2 JUSTICE BREYER: Right. Well, I'm
3 overstating my point. What I'm really driving at and
4 trying to show you is you, if you want to have a
5 different rule than within the prior case, remember the
6 one where it wasn't the police that blundered, you have
7 to come up with some rule. And I want to know what your
8 rule is.

9 MR. DREEBEN: Well, the rule, to state it
10 simply, that I think should govern this case is: An
11 isolated and negligent police clerical error in the
12 maintenance of warrant records should not lead to
13 suppression. And the reason for that is there are ample
14 incentive for the police to attempt to correct their own
15 records such that the exclusionary rule would not
16 approve --

17 JUSTICE BREYER: So now we have -- let's
18 think about that. The special rule is now we have the
19 Leon exception and now we have a new exception, and the
20 new exception is called for isolated police clerical
21 errors. Well, that's going to be interesting, I
22 suspect.

23 The first thing you'll have when you try to
24 impose your rule is you will have the defense attorneys
25 throughout the city going in to see if it's an isolated

1 error. And they will, of course, have a right to decide
2 whether or not this is the only such error, whether
3 there are other clerical errors, how often they occur,
4 what the -- is that an administrable rule?

5 MR. DREEBEN: I think it's highly
6 administrable. It doesn't create that many problems.
7 This exclusionary rule hearing is an illustration. The
8 warrant clerk for Dale County was on the witness stand.
9 The warrant clerk for Coffee County was on the witness
10 stand. The arresting officer was on the witness stand.
11 All of those people were asked, do these errors occur
12 with frequency? They said: They don't; our system is
13 reliable.

14 JUSTICE KENNEDY: And if there were
15 pervasive deficiencies, I assume that's exactly what we
16 would inquire about under 1983?

17 MR. DREEBEN: That's correct, Justice
18 Kennedy.

19 JUSTICE KENNEDY: And would you add 1983 as
20 number four to your list?

21 MR. DREEBEN: Yes, I would add number -- I
22 would add 1983 possible liability as an additional
23 incentive, just as it was remarked in Hudson that it
24 provides for additional incentive for --

25 JUSTICE BREYER: One other question.

1 Suppose that the error here consisted not of a computer,
2 but rather Joe, who is the policeman, has a partner
3 called Sam, and Sam told Joe that this is Harry Smith,
4 when negligently it wasn't Harry Smith? It was Joe
5 Smith.

6 MR. DREEBEN: Well, I think --

7 JUSTICE BREYER: Well, I mean does that
8 count as a clerical error if, in fact, it's the man's
9 partner who tells him this negligently?

10 MR. DREEBEN: I'm with Miss Karlan on this
11 one. I don't think that's a Fourth Amendment violation
12 at all. I think under Hill v. California --

13 JUSTICE BREYER: Negligent. It's Negligent
14 police work.

15 MR. DREEBEN: Yes. It's a mistake.

16 JUSTICE BREYER: That's negligent error.
17 You mean we don't suppress the negligent errors of the
18 partners who, after all, say, let's arrest this man over
19 here, and through negligence they have got the wrong
20 man? We don't suppress?

21 MR. DREEBEN: I think that that's a very
22 close case, and I don't think that this Court --

23 JUSTICE BREYER: There must be millions --
24 not millions, but there must have been cases where two
25 policemen or one policeman goes off to arrest someone

1 and negligently arrests the wrong man. And when he does
2 that and does a search, we don't suppress.

3 MR. DREEBEN: What we know about that from
4 this Court's cases is that if one police officer has a
5 warrant and it's, he obtained it based on an affidavit,
6 that's purely a bare-bones --

7 JUSTICE BREYER: That's Leon. I'm not
8 thinking that.

9 MR. DREEBEN: No, it's actually not Leon.
10 It's Whiteley versus Warden. And I'm positing a warrant
11 that was completely based on a bare-bones affidavit. So
12 it would not pass the Leon test.

13 JUSTICE BREYER: I'm not thinking of a
14 warrant. I'm thinking of a policeman who has a warrant
15 for Jack Smith and he goes to arrest Jack Brown because
16 through negligence he went to the wrong house. Now,
17 under those circumstances would we suppress the drugs
18 that happen to be found in Jack's house.

19 MR. DREEBEN: I don't think it's so clear
20 from this Court's cases.

21 JUSTICE BREYER: Well, there must have been
22 a lot of cases.

23 MR. DREEBEN: Well, not in this Court.

24 JUSTICE BREYER: But what about the lower
25 courts? What have they done?

1 MR. DREEBEN: I'm not so aware that there
2 are so many of them in the lower courts where it's
3 negligence. Most often the kind of mistakes that's
4 made, the courts say it's within the realm of probable
5 cause if it's a reasonable mistake. If it's an
6 unreasonable mistake, negligent mistake, I would be
7 prepared to say that the lower courts are probably today
8 suppressing. And this Court doesn't have to decide
9 whether that's correct in order to decide this case.
10 This case --

11 JUSTICE KENNEDY: Do we use the word or the
12 phrase "good faith" in writing the opinion if we write
13 it your way?

14 MR. DREEBEN: I don't think the Court needs
15 to use the word "good faith." The Court used the words
16 "good faith" in Leon. It's repeated it in all of its
17 so-called good faith exclusionary rule exceptions.
18 We're talking about an objective rule, and the line that
19 I think that the Court should draw today is between
20 isolated negligent errors and errors that result from a
21 more systematic or widespread pattern, the kind that
22 Justice O'Connor referred to in her concurrence in
23 Arizona v. Evans.

24 JUSTICE SCALIA: You would allow all of that
25 inquiry every time there's a motion to exclude. That

1 would not just be the basis for 1983. You still want
2 negligence inquiry.

3 MR. DREEBEN: I don't want it. I'm saying
4 that the Court doesn't have to reach the issue today of
5 whether a widespread pattern of errors or complete
6 neglect --

7 JUSTICE SCALIA: Thank you. That's a little
8 different.

9 MR. DREEBEN: Yes. That's not to say --

10 JUSTICE SOUTER: What about reaching -- what
11 about reaching your standard in cases in which the
12 arrest is wrong, not because there's no warrant, but
13 because there's just slightly less than probable cause?
14 If there are isolated incidents of that are we going
15 to -- are we going to say that in fact that does not
16 violate the Fourth Amendment?

17 MR. DREEBEN: I think that's a very
18 different -- well, whether it violates the Fourth
19 Amendment or not would turn on whether there is in fact
20 probable cause. If there is no probable cause, and I
21 understood your question, Justice Souter --

22 JUSTICE SOUTER: No. We're starting with
23 the assumption that there is a violation of the -- I
24 think we're starting with background law at this point
25 that there is a violation of the Fourth Amendment if

1 there is an arrest without probable cause or without a
2 valid warrant.

3 MR. DREEBEN: Yes.

4 JUSTICE SOUTER: The warrant itself may be
5 subject to attack, but at least that's sort of the front
6 line of our objective reasonableness inquiry. And
7 you're making a dent in the warrant requirement for
8 isolated incidents, and I don't see why we can't or why
9 coherence would not require us to make the same dent in
10 the probable cause requirement for equally isolated
11 mistakes.

12 MR. DREEBEN: I think it's simply a
13 different inquiry, Justice Souter, because, as I tried
14 to explain, in this area the Court can note a number of
15 incentives that law enforcement has to keep its warrant
16 databases accurate and up to speed.

17 JUSTICE STEVENS: Mr. Dreeben, can I ask a
18 background question? How frequent does the issue in
19 this case arise?

20 MR. DREEBEN: In my experience, Justice
21 Stevens, not that frequently.

22 JUSTICE STEVENS: That's my understanding,
23 too.

24 MR. DREEBEN: And I think --

25 JUSTICE STEVENS: It seems to me the case

1 may have more symbolic importance than practical
2 importance.

3 MR. DREEBEN: Well, I think that the
4 practical importance of it and the legal importance of
5 it is what, kind of a balance is the Court going to
6 strike under the exclusionary rule. We heard a lot from
7 Petitioner today about how the exclusionary rule would
8 help make police engage in better practices. We heard
9 nothing about the costs of the exclusionary rule.
10 Compared to, for example, to --

11 JUSTICE STEVENS: Are there any cases where
12 -- this is a drug peddler here that was caught. Are
13 there any cases involving violent criminals that have
14 been affected by the outcome of this case?

15 MR. DREEBEN: Some in the lower courts have
16 involved violent crime, and I think this case would look
17 and feel very different if evidence of a murder had been
18 discovered in the car. And that just accentuates the
19 point that the exclusionary rule comes with a price to
20 society. It's not free.

21 JUSTICE SCALIA: Mr. Dreeben, if we adopt
22 your formulation that isolated negligence doesn't count,
23 is it clear that that's all there was in this case?

24 MR. DREEBEN: Well, that's all that the
25 district court found. The district court had evidence

1 and made a finding that there was no pattern of
2 violations like this, that the system of recordkeeping
3 was generally reliable. This is the findings of the
4 district court that are on page 17a and 18a of the
5 Petitioner appendix. The district court concluded:
6 "There is no credible evidence of routine problems with
7 disposing of warrants and the warrant clerk herself
8 could not recall other instances like this."

9 JUSTICE SOUTER: Well, if Miss Karlan's
10 figures are correct in Alabama there would be
11 suppression.

12 MR. DREEBEN: Well, there was no record made
13 whatsoever on what Alabama's overall --

14 JUSTICE SOUTER: No. I said if her figures
15 are correct and there's a 13 percent error rate either
16 in the State of Alabama or at least in the department
17 involved that we'd have suppression there.

18 MR. DREEBEN: Unless -- if the Court is
19 prepared to say that the exclusionary rule is going to
20 function differently on a State by State basis depending
21 on the statewide error rate, which I think is an unusual
22 thing for the Court to do --

23 JUSTICE SOUTER: Well, it's going to
24 function -- even on your theory, it's going to function
25 differently on a department to department basis

1 depending on the error rate.

2 MR. DREEBEN: Upon a -- Not just upon a
3 showing of an error rate, but upon a showing that a
4 particular recordkeeping system that produced an error
5 was conducted in a manner so that you could say much
6 more than negligence was involved here.

7 JUSTICE SOUTER: Well, if you've got a 13
8 percent error rate I think you've got a pretty good
9 prima facie case.

10 MR. DREEBEN: You do. I would concede you
11 have a good prima facie case. I would want to know more
12 to know what that really means because with a lot of
13 these statistics --

14 JUSTICE SOUTER: But the fact is unless the
15 "more" showed that they were getting a 13 percent error
16 rate in a negligence-free system, you would have
17 suppression there and you would not have suppression
18 there in the town next door or the county next door or
19 the State next door.

20 MR. DREEBEN: If the Court adopts a rule
21 that says that a showing of more than isolated
22 negligence would justify suppression, you're correct. I
23 would note, though, that --

24 JUSTICE SOUTER: But I thought that
25 basically was the distinction that you were arguing for.

1 MR. DREEBEN: No. I think I clarified to
2 Justice Scalia that I think all the Court needs to
3 decide today is that an isolated negligent error in
4 police recordkeeping should not result in suppression.
5 It should not hold today because it's not confronted
6 with today --

7 JUSTICE SOUTER: But I take it if you're not
8 accepting -- if you're not accepting -- I mean, you're
9 not accepting the proposition that the 13 percent error
10 rate which is not somehow shown to be non-negligent
11 should have a different result, you are saying in the 13
12 percent case we're still not going to suppress.

13 MR. DREEBEN: I would reserve the right to
14 argue that the exclusionary rule's costs outweigh its
15 benefits even if that is shown in a particular case
16 because there are a myriad of other reasons why the
17 police would have an incentive to improve that.

18 JUSTICE SOUTER: But if you -- if you were
19 to make that argument and it came down to that bald a
20 proposition, I assume you would come in with some kind
21 of evidentiary basis to tell us exactly what the cost
22 is. And you have spoken of the cost today. You have
23 not spoken of the benefit and the value of having
24 relatively error-free arrest recordkeeping. But I
25 haven't heard anything about the unreasonable cost of

1 the exclusionary rule --

2 MR. DREEBEN: Well I think --

3 JUSTICE SOUTER: -- beyond the record.

4 MR. DREEBEN: It's manifested in it every
5 case in which reliable probative evidence is suppressed.

6 JUSTICE SOUTER: Sure, sure it is. But that
7 does not even get us to, as it were, to half the
8 equation. We want to be know how much of that there is
9 and we want to be able to measure against that the value
10 that society is getting by requiring valid arrest
11 warrants and in a probable cause case by requiring
12 probable cause. And you can't just walk in and say,
13 well, there's a cost. We know there's a cost.

14 MR. DREEBEN: I don't think, Justice Souter,
15 that the Court has ever looked for an empirical count of
16 how many cases.

17 JUSTICE SOUTER: Don't you think we should
18 if we are in effect -- if you are making what sounds to
19 me like an empirical argument -- there is a cost to
20 society, cases are being lost, criminals are going free
21 -- don't you think that we ought to have a factual basis
22 to know what that cost is?

23 MR. DREEBEN: If the Court wants one in
24 order to justify the exclusionary rule, then it probably
25 needs to go back to scratch and start all over again.

1 JUSTICE SOUTER: We've done an exclusionary
2 rule now and in effect you are arguing for an exception
3 to it because the cost is too great, and it seems to me
4 the burden is on you to tell us what the cost figure is.

5 MR. DREEBEN: I will say this, Justice
6 Souter. If the cost is very low because very few cases
7 result in suppression, then deterrence is also very low
8 because there are very few cases in which evidence is
9 being suppressed.

10 JUSTICE SOUTER: But if you take that
11 argument to the extreme, we won't have an exclusionary
12 rule at all, I suppose.

13 MR. DREEBEN: But my argument today does not
14 require the Court to take that step at all because this
15 is an area in which there is a local geography of
16 incentive pertaining to the accuracy of warrants that
17 allows the Court to conduct the balance in a way
18 distinct from what it might do if it's confronted with
19 police negligence or if it's confronted with a
20 widespread pattern of negligence.

21 JUSTICE STEVENS: Of course, if you did the
22 cost-benefit analysis the way Justice Stewart would, the
23 cost is always zero to the State because they would not
24 have had the evidence if they had obeyed the law.

25 MR. DREEBEN: Yes, but I think, Justice

1 Stevens, that form of looking at the question has been
2 rejected in this Court's cases that have recognized that
3 the exclusionary rule has to pay its way because in
4 every case in which it results in suppression there is a
5 cost to society and the benefit therefore needs to be
6 appreciable and this Court needs to be confident of that
7 before it concludes that what the Court called the
8 "massive remedy of exclusion" is applied in any
9 particular case.

10 CHIEF JUSTICE ROBERTS: We know what the
11 cost was here, right? I mean, not just a drug peddler,
12 but somebody with an illegal weapon found in his car, a
13 weapon that presumably he would use on an occasion in
14 which it was in his view appropriate to do so.

15 MR. DREEBEN: Correct. There was benefit in
16 this very case and cost if the evidence is suppressed.

17 JUSTICE SOUTER: But don't you take -- I
18 understood you to take the position and I thought the
19 Court had previously taken the position that the cost
20 benefit analysis had to be a systemic one.

21 MR. DREEBEN: I think that that's correct,
22 Justice Souter, but I'm not aware of any case in which
23 the Court has said the exclusionary rule has costs and
24 now we need to see the numbers of statistically how many
25 cases result in suppression. I'm just not aware of any

1 case in which the Court has done that.

2 JUSTICE SOUTER: No, I think that's -- I
3 think that's true. I mean, we operate -- quite think
4 frankly we operate on the basis of a -- of a good guess
5 and I think your argument is saying let's have -- let's
6 have an exception to the good guess. And if -- if you
7 start with a good guess as the baseline it seems to me
8 you -- you ought to have something more than another
9 guess to justify the exception.

10 MR. DREEBEN: Well, Justice Souter what my
11 case comes down to today I believe is the proposition
12 that when we are talking about clerical errors made by
13 the police, there are ample incentives for the police
14 not to make those clerical errors that I've described
15 earlier, such that the incremental benefit of the
16 exclusionary rule which we know has a cost; it has a
17 tangible cost in every case in which it's applied; does
18 not pay its own way. In other words, there is no
19 sufficient incremental deterrence to warrant taking an
20 isolated negligent error in a generally reliable system
21 and saying we need to suppress evidence anyway; and
22 Petitioner's argument goes farther than the isolated
23 negligent error case. It says even if the police have
24 driven the error rate down as low as it's humanly
25 possible by committing mass amounts of are resources to

1 warrant database systems in order to avoid suppression,
2 which is what the Petitioner's theory posits, you should
3 still suppress; and that seems to me nothing other than
4 the return to the theory when there is a Fourth
5 Amendment violation, suppression automatically follows;
6 and this Court --

7 JUSTICE GINSBURG: But that's not what we
8 have here, and we have a 13 percent error rate. If this
9 case goes your way, the police have limited resources;
10 why should they spend them on upgrading their computer
11 system when if there is an error it wasn't matter?

12 MR. DREEBEN: Well, it does matter, Justice
13 Ginsburg, because the police officers that I'm familiar
14 with and the agencies that I'm familiar with as
15 exemplified by the NCIC which is the national database,
16 says that the last thing that we want to do is send
17 officers mistakenly out on a felony arrest where they
18 are going to be placed in a potentially dangerous
19 situation spending community police resources to arrest
20 somebody who should not be arrested. This is not what
21 they want to do. They have a good reason to avoid being
22 placed in that situation and I would caution the Court
23 against relying on a 13 percent figure in a study that's
24 submitted in a brief to this Court for the first time
25 without any kind of adversarial testing. That is not I

1 this think a reliable basis for the Court to infer that
2 this particular police department had that kind of an
3 error rate or that the exclusionary rule is necessary to
4 prevent it from having that kind of an error rate or
5 even that there were no procedures in place to prevent
6 errors and warrants from remaining in the system.

7 The record simply doesn't show that. The
8 warrant clerks were on the stand and neither party asked
9 them the question so this Court doesn't have the
10 information to say today was there a system that would
11 have ferreted this out. We know that if there was it
12 failed in this case.

13 JUSTICE KENNEDY: In Hudson versus Michigan,
14 didn't the Court engage in a very broad balancing of the
15 social costs and the potential for increase in
16 violations in saying that there was no necessity for the
17 suppression rule in the no-knock case?

18 MR. DREEBEN: Yes, Justice Kennedy; the
19 Court did just that and it began with the outset that
20 the massive remedy of suppression of evidence is a high
21 social cost that should not be borne by society, not
22 just the police, by all of us, unless appreciable
23 deterrence will result as a benefit; and the Court then
24 examined the incentives that the police had not to make
25 illegal no-knock entries and to add that whatever

1 incremental benefit there might be from exclusion was
2 not justified in light of the possibility of 198e
3 liability and the increased professionalism of the
4 police which has made it less necessary to make the
5 exclusionary rule a remedy of first resort rather than
6 last resort. While this Court could conceptualize the
7 case as one in which the government is looking for an
8 exception to the exclusionary rule, I think it's more
9 accurately one where the Court should extend the
10 exclusionary rule to cover negligent police clerical
11 errors. For the first time, at this day and age when
12 1983 recoveries have become effective --

13 JUSTICE GINSBURG: How many 1983 recoveries
14 have there been when someone says the police, they
15 convicted me on the basis of this evidence that wasn't
16 suppressed, but they committed a Fourth Amendment
17 violation so I should prevail in the 1983 action? How
18 many defendants in that situation have ever won a 1983
19 action?

20 MR. DREEBEN: No one knows, Justice
21 Ginsburg, because a great many of these cases will
22 settle out of court, but our brief does provide examples
23 of conduct that was more serious and more egregious than
24 anything involved in this case resulting in situations
25 where courts denied summary judgments to the defendants

1 and ordered the cases to go to trial.

2 And I'm not suggesting that in a case like
3 this -- may I complete the answer -- there should be a
4 1983 remedy, but I am suggesting that civil remedies
5 will provide incentives to the police to avoid the bog
6 of litigation by putting into place systems that will
7 prevent this kind of error.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Dreeben. Miss Karlan, you have eight minutes
10 remaining.

11 REBUTTAL ARGUMENT OF PAMELA S. KARLAN
12 ON BEHALF OF THE PETITIONER

13 JUSTICE BREYER: Can I use 30 seconds of
14 your eight minutes because I want some clarity on this.

15 MS. KARLAN: Absolutely.

16 JUSTICE BREYER: Divide in your mind two
17 separate things: The nature of the bad conduct: is it
18 negligent, reckless, deliberate; and the other question
19 is who engaged in it -- a police department official or
20 some other official?

21 I thought this case was about the second
22 question, but now I'm confused about the first question
23 because I suppose a policeman, an arresting officer
24 makes a negligent error. He goes to the wrong house.
25 And he never looks at the number; and he arrests, starts

1 to arrest the wrong person: Is the evidence suppressed?

2 If the evidence isn't suppressed, frankly, I
3 don't see why a clerical official should be held to a
4 higher standard; but if the evidence is suppressed then
5 quite possibly the clerical official should be held to
6 the same standard. So you've heard the government say
7 well, the answer isn't clear; very often a negligent
8 official -- a negligent officer would not have that
9 evidence suppressed. Well, what is it?

10 MS. KARLAN: The answer to your question,
11 Justice Breyer, is if the police officer in your
12 hypothetical was negligent the evidence would be
13 suppressed. There are cases where the mistake of the
14 officer was a reasonable mistake, that is. He did not
15 --

16 JUSTICE BREYER: He was not.

17 MS. KARLAN: Then he was not negligent.

18 JUSTICE BREYER: I want to know if he is
19 negligent.

20 MS. KARLAN: If he is negligent --

21 JUSTICE BREYER: Excuse me, because I think
22 I'm getting a different view from the government.

23 MS. KARLAN: I'm absolutely certain that the
24 answer is if he was negligent then there was not
25 probable cause; if there was not probable cause and one

1 of the other exceptions to the exclusionary rule does
2 not apply, then the evidence will be suppressed.

3 JUSTICE KENNEDY: And the definition of
4 negligence is that he was not objectively reasonable?

5 MS. KARLAN: That's correct.

6 JUSTICE BREYER: All right. So we've got
7 this --

8 MS. KARLAN: And the rule we are asking for
9 here -- the narrow rule for our Petitioner is when you
10 have negligent error by police officials, you suppress
11 but as Justice Scalia pointed out in my colloquy with
12 him earlier, that rule is perhaps slightly less workable
13 than a rule that says all error.

14 Now we have given you a workable rule here
15 and we still have not heard I believe a workable rule
16 from the government; because what Mr. Dreeben tells you
17 is that under some circumstances there will be
18 suppression. And I just want to make up with factual
19 correction here which is about the 13 percent. It was a
20 study by the FBI. It's a very dated study because they
21 haven't done a more recent one and it was statewide.
22 But let assume for purposes of argument here that if 13
23 percent of the errors in the file are there because the
24 police are not maintaining their records properly, there
25 ought to be suppression of a warrantless arrest based on

1 that because otherwise you're really telling the
2 department that "good enough for government work" is,
3 you know, one out of six warrants is invalid, one out of
4 seven warrants is invalid, but that's okay.

5 So then what you would have to have in each
6 case is a hearing, and at the hearing we would be
7 entitled to discovery --

8 JUSTICE KENNEDY: But in that -- but in that
9 hypothetical I think it might be easy to say that the
10 policeman on the beat was not objectively reasonable in
11 relying.

12 MS. KARLAN: But Justice Kennedy --

13 JUSTICE KENNEDY: But that's certainly not
14 the case here.

15 MS. KARLAN: But Justice Kennedy, if you
16 believe in the government's rule we should have a right
17 to audit that system to show that 13 percent of the
18 warrants --

19 JUSTICE SCALIA: I agree with that. If --
20 to say with Mr. Dreeben that we don't have to decide
21 that today is just unrealistic. We have to decide today
22 whether we are going to adopt a rule that down the road
23 will turn every exclusionary request into a pretrial
24 investigation of the procedures of the police.

25 MS. KARLAN: Yes. That's --

1 JUSTICE SCALIA: And a major -- major trial.

2 CHIEF JUSTICE ROBERTS: Not the procedures
3 of the police. The officer is on the stand and you say,
4 all right, you've been here a while, how many times have
5 these warrants turned out to be wrong, just as simple as
6 it was in this case? And he says, gosh, this is the
7 first time that I've had this question.

8 MS. KARLAN: But one of the things we know
9 from the oral argument and the transcript in Evans is
10 that clerk said this is the first time there has ever
11 been an error, and it turned out there were four errors
12 them made the same day.

13 CHIEF JUSTICE ROBERTS: Okay. Cross-examine
14 people. These people are under oath, you cross-examine.
15 You say, I don't think that's right. How many times?
16 It's not that big a deal to find out on what basis the
17 arresting officer was acting.

18 MS. KARLAN: Right. But we would be
19 entitled I think, Mr. Chief Justice, to say to the clerk
20 on the stand, have you ever conducted an audit? She
21 says, no, but our system is reliable.

22 At that point I think we are entitled to an
23 audit. That is we are entitled to hire an expert at
24 government expense to figure out how many times this
25 department has gotten it wrong.

1 JUSTICE ALITO: Isn't your rule also going
2 to require hearings. If negligence is required --

3 MS. KARLAN: The hearing in this case --

4 JUSTICE ALITO: -- you are going to have to
5 have a hearing on whether there was negligence. And if
6 so, who was negligent. If only causation is required,
7 you're going to have to have a hearing on who caused it.

8 MS. KARLAN: Justice Alito, we had a hearing
9 in this case that's adequate to the rule that we have
10 and it took approximately two hours.

11 JUSTICE ALITO: And will that be the case in
12 every instance?

13 MS. KARLAN: It will be the case more often
14 than that you'll have a two-hour hearing that you have
15 to show isolated --

16 JUSTICE ALITO: How do you know that? What
17 basis do you have for saying that? How do you know
18 that? How many of these hearings have you examined?

19 MS. KARLAN: Hearings in which there was no
20 warrant? I have examined none, but I can't imagine that
21 it would take more than two hours. In this case it took
22 two hours.

23 All you have to do is figure out who said
24 there was a warrant when there wasn't one. Was it a
25 court employee under Evans? The answer is then clear.

1 You let the evidence in. Was it not the court, that is,
2 everybody concedes that the court called, everybody
3 concedes the warrant was removed, everybody concedes
4 that the warrant went back? Then you answer it that
5 way.

6 JUSTICE KENNEDY: Suppose it were an agency
7 like INS or Customs in which they have many people that
8 are not sworn officers or some that are, does it make a
9 difference who answered the phone?

10 MS. KARLAN: I don't think the sworn officer
11 distinction makes a difference. I think the agency
12 does.

13 If I can refer to the State cases here, I
14 think they can illustrate how to answer your question
15 more precisely, Justice Kennedy. That is, a number of
16 States suppress evidence under these circumstances, and
17 they ask what's a question of law that then applies to
18 all future cases, which is, is this agency an adjunct of
19 law enforcement or is it something else?

20 So, for example, in California, the
21 Department of Corrections, not. They are not an
22 adjunct. So errors by the Department of Corrections,
23 evidence is admitted. The State of Florida, the
24 Department of Motor Vehicles is an adjunct. So there if
25 the Department of Motor Vehicles makes the mistake,

1 there is suppression.

2 This rule has been --

3 JUSTICE KENNEDY: In Rand we said this is
4 exactly the inquiry we are not going to make.

5 MS. KARLAN: I'm not sure.

6 JUSTICE KENNEDY: Rand was where we had a
7 traffic stop made by a narcotics officer. And the
8 question was, well, he was going outside his
9 jurisdiction. We said we are not going to get into the
10 way police departments are organized. We are just not
11 going to do it.

12 MS. KARLAN: That's correct.

13 JUSTICE KENNEDY: That's Rand.

14 MS. KARLAN: No. I understand Rand
15 perfectly well, Justice Kennedy. But the question here
16 is not a Rand case. It's what counts as the police?
17 And that's the only question we are asking you to answer
18 here, is what counts as the police? Everyone who works
19 for the police department. When they make a negligent
20 error, that's enough.

21 Now, let me turn for just a moment to the
22 question of the bloated records and their incentives.

23 JUSTICE SCALIA: That's your bottom line
24 position, it has to be a negligent error?

25 MS. KARLAN: In this case, yes. Yes. I'm

1 perfectly happy --

2 JUSTICE SCALIA: What is the position you're
3 arguing for?

4 MS. KARLAN: We are arguing for negligent --

5 JUSTICE SCALIA: You want to adopt a rule
6 that's only when it's a negligent error?

7 MS. KARLAN: We are arguing for that rule
8 but wanted you to understand that there is a tradeoff as
9 you identified earlier. Our rule is, I think, a clean,
10 narrow rule. It may require, as Justice Alito has
11 pointed out, slightly more detailed hearings.

12 Let me turn now to this question of the
13 incentives, which is the incentives of departments, as
14 illustrated in this case, are to leave the question of
15 maintaining records to the end of the line in spending
16 their resources, because they are not going to have to
17 serve these warrants. These warrants serve as an
18 opportunity to stop and arrest someone they otherwise
19 wouldn't be able to stop and arrest here, because they
20 like probable cause.

21 All they had to do to cite -- Justice
22 Kennedy, to cite Rand to you is if they wanted to follow
23 him for a while, I'm sure they could have found a motor
24 vehicle violation at some point. But they didn't even
25 want to do that. They just wanted to use this

1 warrant --

2 CHIEF JUSTICE ROBERTS: So that's assuming
3 bad faith on the part of the police.

4 MS. KARLAN: No, it's good faith.

5 CHIEF JUSTICE ROBERTS: They want to arrest
6 him, so they follow him until they find a motor vehicle
7 violation.

8 MS. KARLAN: This Court has said it's
9 absolutely fine and it's not bad faith.

10 CHIEF JUSTICE ROBERTS: But you're
11 suggesting it's bad faith --

12 MS. KARLAN: No, I'm not suggesting that.

13 CHIEF JUSTICE ROBERTS: -- because they --
14 because they don't want to have to worry about getting a
15 warrant that might be wrong?

16 MS. KARLAN: No, no. That's not what I
17 said, Mr. Chief Justice. May I please --

18 CHIEF JUSTICE ROBERTS: What was the point
19 of -- well, sure, as long as I'm asking the questions,
20 you can answer.

21 (Laughter).

22 CHIEF JUSTICE ROBERTS: What was your point
23 then? You're saying, well, they want to get this guy
24 and they don't have to go through the warrant or
25 anything else. They can follow him, find the broken

1 taillight and then they would have gotten that guy. I
2 thought that was the point you were trying to make?

3 MS. KARLAN: No. The point I was -- the
4 point I was trying to make is that there are other
5 techniques here if you haven't as yet inarticulable
6 suspicion that somebody is a bad guy that you can use
7 that to comply with the Constitution. What you can't do
8 is rely on a warrant that doesn't exist, and then turn
9 around and say police error, but we are entitled to rely
10 on our own error.

11 JUSTICE SCALIA: May I ask one question,
12 Chief.

13 CHIEF JUSTICE ROBERTS: Sure.

14 JUSTICE SCALIA: Your -- your comment seems
15 to assume that these warrants just lie there and the
16 police only use them incidentally. I have always
17 assumed that when a warrant is out, part of the job of
18 the police is to -- is to arrest the person. Isn't that
19 the case?

20 MS. KARLAN: Well, there are really two very
21 different kinds of warrants out there, Justice Scalia,
22 as I understand it. One is warrants the police go and
23 try and find themselves, and then they are trying to
24 serve those aggressively. But there are a lot of
25 warrants like this one that sat in a file for five

1 months, nobody tried to serve it during the vast
2 majority of that time because a lot of these warrants,
3 as is true in this case, are for failure to answer a
4 calendar call or for not paying a parking fine on time
5 or for not sending in your fine on a motor vehicle.

6 In the Ott case that we cite it was failure
7 to pay child support.

8 So those are not the kinds of things where
9 the police are serving the warrants aggressively.

10 CHIEF JUSTICE ROBERTS: Thank you
11 Miss Karlan, the case is submitted.

12 (Whereupon, at 11:06 a.m., the case in the
13 above-entitled matter was submitted.)

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